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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THOMAS PASHA,
PETER STRAGUZZI,

Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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QUESTIONS PRESENTED

Did the District Court err in admitting a chemical analysis of alleged cocaine without sufficient showing that the substance was the same as allegedly seized in this case?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1984

THOMAS PASHA
PETER STRAGUZZI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner seeks a writ of certiorari to review the judgment of this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

In the United States District Court, an opinion was filed which is made part of this record, the Court imposed the judgment of sentence (App. A1) (App. A3) from which a direct appeal was taken to the Court of Appeals.

The judgment order of the Court of Appeals (App. A16) was issued on November 6, 1984 and is as yet unreported.

JURISDICTION

A judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals (App. A1) (App. A3).

The judgment of the Court of Appeals was entered, with opinion, on November 6, 1984 (App. A16).

STATEMENT

On October 11, 1983, Mr. Pasha and Mr. Straguzzi were arrested and charged with participating in a scheme to sell cocaine to an undercover agent. At the time of the arrest, the alleged narcotic was seized by Officer John D'Amico of the Philadelphia Police Department. This appeal deals solely with his handling of the evidence after it came into his possession. Officer D'Amico took the package from Raymond Marano, an alleged co-conspirator. (Trial Transcript, hereinafter referred to as T.T. 2-38 - 2-39). He physically examined it and weighed it. (T.T. 2-39).

After leaving the arrest scene, Officer D'Amico took the seized package to the Narcotics Unit, placed it on a property receipt and in a sealed envelope and turned it over to an Officer McQuillan (T.T. 2-40). At no time was a property receipt produced for the officer to examine and identify as the one he filled out. 1/

Officer McQuillan, also of the Narcotics Unit of the Philadelphia Police Department, testified but never stated that he received the package in question or had handled any of the physical evidence in the case. (T.T. 2-81 - 2-86).

Michael Brister, a chemist with the Philadelphia Police Department, next testified. He stated that he removed a package for analysis from a sealed bin in the police laboratory. (T.T. 2-95). There was a property receipt with the

package. The chemist then tested the contents and found the powder to be cocaine. 2/ It is important to note that no other witness had been presented with this property receipt. Neither Officer D'Amico nor McQuillan ever testified that they prepared it or related it to the package they had seized.

Dr. Thomas Branford, the Director of the Police Laboratory, testified that he was directed to destroy the package in question by a Pennsylvania Common Pleas Court Order obtained by the Philadelphia District Attorney's Office. It was subsequently incinerated. (T.T. 2-104).

On March 12, 1984, Appellants Thomas Pasha and Peter Straguzzi were found guilty of conspiracy to distribute a Schedule II controlled substance, distribution of a controlled substance and use of a communication facility to

facilitate the distribution of a controlled substance. Each defendant moved for a new trial.

On April 26, 1984, aforesaid motions were denied by the Honorable Norma L. Shapiro in a written memorandum and order.

On November 6, 1984, the United States Court of Appeals for the Third Circuit filed a Memorandum Opinion of the Court confirming the Judgment of the District Court.

1/ The testimony on this point must be reviewed with precision. The opinion of the trial court concludes that, "Officer D'Amico testified that he turned the cocaine over to Police Officer William McQuillan who carried it to the laboratory and dropped it in a sealed evidence bin that same day". The testimony on the issue is for short of this:

Q. What did you do with the package you received from Marano?

A. It was held by me and hand carried by me to the Narcotics Unit, placed on a property receipt and the seizure analysis and placed in a sealed envelope by me and submitted to the police laboratory.

Q. Did you submit it to the laboratory?

A. No Ma'am.

Q. Did you give....

A. Officer McQuillan did.

Q. Did you give the package to Officer McQuillan.

A. Yes. (T.T. 2-40)

The entire record is utterly devoid of any testimony by either D'Amico or McQuillan that the evidence was placed in a "sealed evidence bin that same day" or any other.

2/ Again, the testimony must be analyzed with precision. The trial court concluded "Michael J. Brister, Philadelphia Police Chemist, testified that he retrieved the cocaine from the sealed evidence bin...." (emphasis added). Unquestionably, the chemist obtained a package from the bin. But who placed it there? Was it the same package for which Officer D'Amico prepared a property receipt? It it was the cocaine, it would have been a simple matter for Officer D'Amico to identify the property receipt or Officer McQuillan to testify that he had placed it in the bin.

REASONS FOR GRANTING THE WRIT

The actions of the District Court, as affirmed by the Court of Appeals for the Third Circuit are contrary to the long established precedents of this Court.

In effect, the actions of the Trial Court and the District Court of Appeals now permits the introduction of chemcial analysis where that which was analyzed has been destroyed and where the chain of custody leading to the analysis has been broken.

I. The District Court erred in admitting a chemical analysis of alleged cocaine without showing that the substance was the same as allegedly seized in this case.

The trial court's opinion states "Evidence regarding a chain of custody does not affect admissibility, only the weight of the evidence". This seems to suggest that the trial court is not obliged to make a threshold review of the "chain of custody" and if it is found lacking, take the question from the jury. In U.S. v. Daughtry, 502 F2d 1019 (5th Cir. 1974), the chain of custody was challenged. The court noted: "There are two basic questions involved with every piece of physical evidence admitted in every trial (i) whether to admit the evidence and (ii) what weight to give that evidence once admitted. The first is the one apellant poses here and it is a question for the trial judge to decide in exercising control over conduct of the trial" (at 1021) (See also U.S. v. Luna, 585 F2d 1 (1st Cir 1978); U.S. v. Brown, 482 F2d 1226 (8th Cir 1973).

In addition, the standard that the trial court must use is higher and the scrutiny greater where the question raised is the identity of the evidence itself rather than possible changes in its condition. The instant case poses the question "was the analyzed material the evidence seized", not whether the original package had been tampered with. The importance of the question is heightened by the subsequent destruction of the evidence through no fault of Mr. Pasha's and Mr. Straguzzi's. Given the incineration of the package, none of the witnesses were able to examine the evidence and testify that it ever appeared to be the item that was seized on October 11, 1983. This unusual fact pattern heightens the requirement for a careful examination of the "chain of custody" since the heart of the case is the identity of the package seized. As the

court noted in U.S. v. Lampson, 627 F2d 62 (7th Cir. 1980): "Courts need exercise greater care when the issue concerns the very identity of the evidence rather than just possible changes in its condition. The Government's burden of proving each and every element of the crime cannot be diluted by unwarranted presumptions about the evidence it seeks to introduce. Although such heightened scrutiny is appropriate for chain of custody identification cliams, automatic exclusion is not required. Whether or not the possible problem with the Government's proof is sufficiently serious to take it from the jury rests in the sound discretion of the trial judge". (at 65).

It is within this context of heightened judicial scrutiny of chain of custody that the present facts must be analyzed. A review of footnotes 1 and 2 supra, sharpen the controversy.

Apparently, the trial court felt that it could conclude that the package in question made its way to the evidence bin in the police laboratory without any direct testimony on the subject. The record is silent as to Officer McQuillan's actions and not a single witness presents a scintilla of testimony that the seized package was ever placed in the evidence bin. This was almost precisely the situation the court faced in U.S. v. Panczko, 353 F2d 676 (7th Cir 1965), cert denied 383 U.S. 935, 86 S.CT. 1066, 15 LEd2d 853 (1966). An Officer Esposito had seized a set of keys from the defendant and testified that he gave them to his chief of police. A postal inspector stated that he had gotten the keys that were brought into court from a Lieutenant Renkus who was not the chief of police. No witness testified as to how the keys got into the Lieutenant's

possession just like no witness in the instant case can say the package was placed in the evidence bin. A heightened standard of judicial scrutiny was applied since the question of chain custody went to the very identity of the item. The Court concluded: "There is no evidence as to where or from whom Lieutenant Renkus got the keys. He did not testify. It does not appear in the record that Esposito gave any keys to Lieutenant Renkus. As we have said, Esposito gave the keys to his chief of police who also did not testify. On the retrial of this case the handling of the keys allegedly thrown away by the defendant should be traced by an unbroken chain of evidence". (at 679).

In U.S. v. Mahone, 537 F2d 922 (7th Cir 1976), the court noted the critical importance of the chain of custody where the identity of the item is in question, and where no witness can examine the item

and testify that it in fact was the relevant to the case: "In U.S. v. Blue, 440 F2d 300, (7th Cir. 1971), this court held that "The chain of custody is not relevant when a witness identifies the object as the actual object about which he has testified . A chain of custody must be proved when the condition of the object at a prior time is in issue". (at 930).

Perhaps the conclusion of the trial court that Officer McQuillan placed the package in the sealed evidence bin is best viewed as assumption of what he might have testified to if asked. Can this kind of assumption be made to fill in a break in the chain of custody where identification of the evidence is critical to the prosecution? The court in Smith v. U.S., 157 F2d 705 (D.C. Cir. 1946) faced this very issue: "We think that the identification was insufficient to permit the admission into evidence of the

articles proffered. The only evidence that the proffered watch had been taken from the defendant was witness' statement that Officer Greenfield had said so, a statement immediately denied on the scene by the defendant. The only evidence that the proffered watch had ever been in the possession of LaFon was similar testimony. The only testimony about the purse indicated both a lack of personal knowledge and a failure of reliable recollection on the part of the witness...

There were missing links, which might have been supplied by LaFon or Greenfield or the two together, in the chain of evidence requisite to conviction. The essential gist of the prosecution was that property in the possession of LaFon was forcibly taken by the defendant. The articles proferred being inadmissable because insufficiently identified, there

was a failure of proof on the point". (at 705-706).

The gist of the prosecution in the present case is that the package in question contained cocaine. The evidence was destroyed and could not be identified in court. What Officer D'Amico might testify about the property receipt and what Officer McQuillan might say about going to the evidence bin in purely speculative. Where the identity of an item is at issue, proof of a chain of custody cannot be had by quess work, and it is pure guess work to conclude that the material analyzed was that which was seized by Officer D'Amico.

Finally, it should be noted that the opinion filed by the United States Court of Appeals for the Third Circuit states as follows: "Indeed, the government makes no effort to explain why it failed to elicit from McQuillan that link in the chain, and

we find that omission inexplicable.

Nonetheless, even the authorities proffered by appellants concede that automatic exclusion of testimony or evidence is not required when there is a small gap in the chain of custody."

The above direct quote reflects the break in chain of custody but does not reflect the comparison of that break by reason of the destruction of the evidence. The Third Circuit Court of Appeals apparently bases its opinion upon something known as "small gap". This writer's research finds no differential nor legal explanation of the characterstics of small gap vis-a-vis a normal gap.

Further, this writer presents to this court a case of first impressions wherein the government is unable to present physical evidence nor does the government present a unbroken chain of custody.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD A. RUDLEY
Counsel for Petitioner

OF COUNSEL:

William L. Bowe

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. 83-415-2

UNITED STATES OF AMERICA

v.

THOMAS PASHA

JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant has been convicted as charged of the offenses of aiding & abetting, distribution of cocaine, use of telephone to facilitate a drug felony, conspiracy to distribute cocaine. 18 USC 2, 21 USC 841(a) (1), 843(b), 846...The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 2 years on Count 3, to be followed by a 3 year term of Special Parole. On Counts 1 and 6 IT IS ADJUDGED that the imposition of sentence is hereby suspended and the defendant placed on probation for a period of 2 years upon the following terms and conditions: 1) That he comply with all local, state and federal law. 2) That he comply with the

rules and regulations of the probation department. 3) That he remain free of the use of drugs. The sentence imposed on Counts 1 and 6 are to run concurrent with each other and consecutive to Count 3. The defendant is to self report to the place of incarceration.

/s/ NORMA L. SHAPIRO

United States District Court Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. 83-415-3

UNITED STATES OF AMERICA

v.

PETER STRAGUZZI

JUDGMENT AND PROBATION/COMMITMENT ORDER

The defendant has been convicted as charged of the offenses of aiding & abetting, distribution of cocaine, conspiracy to distribute cocaine. 18 USC 2, 21 USC 841(a) (1), 846...The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 3 years on Count 3, to be followed by a 3 year term of Special Parole. On Count 1 IT IS ADJUDGED that the imposition of sentence is hereby suspended and the defendant placed on probation for a period of 2 years upon the following terms and conditions: 1) That he comply with all local, state and federal law. 2) That he comply with the

rules and regulations of the probation department. The sentence imposed on Count 1 is consecutive to Count 3. The defendant is to self report to the place of incarceration.

/s/ NORMA L. SHAPIRO

United States District Court Judge

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J.

In a trial by jury, defendant Thomas Pasha was found guilty for his part in a cocaine sale to undercover police officers. Pasha filed a motion for a new trial or dismissal of the indictment. He argues that the Government failed to establish an unbroken chain of custody between the officer who received the substance from the defendants and the expert who testified that the substance was cocaine. For the reasons stated, the motion is denied.

On March 12, 1984, defendant was convicted of conspiracy, distribution of cocaine and the use of a telephone to

facilitate its distribution. The Government did not introduce in evidence at trial the cocaine used in the transaction because the cocaine has been destroyed by local police officials. Government witnesses testified that the substance seized was cocaine: 1). Police Officer John D'Amico testified that he smelled the substance, weighed it at 285 gr. and believed it to be cocaine. After he confiscated the cocaine, he maintained it in his sole possession and brought it to the Philadelphia Police Administration Building, Narcotics Unit, where he weighed it again at 285 gr. and placed it in a substance bag with tape. 2). Police Officer D'Amico testified that he turned the cocaine over to Police Officer William McQuillan who carried it to the laboratory and dropped it in a sealed evidence bin that same day. 3). Michael J. Brister, Philadelphia Police Chemist, testified

that he retrieved the cocaine from the sealed evidence bin and weighed it; the weight was substantially the same as the weight of the substance received from defendants by Officer D'Amico. Brister conducted chemical tests upon the substance and concluded that it was in fact, 70% pure cocaine.

The Government concedes that Officer McQuillan did not specifically state that he carried the cocaine from the Narcotics Unit to the laboratory. But Officer D'Amico testified without objection that Officer McQuillan delivered the cocaine to the laboratory. The testimony of Officer D'Amico and Michael Brister, with all reasonable inferences drawn in favor of the Government, established an unbroken chain of custody for the cocaine sold by the defendant.

The Government was unable to produce the cocaine itself because it has inadvertently been destroyed prior to

trial. The substance had been available for examination and tested by Pasha's former counsel but was not available to Pasha's new attorney at trial because it had been destroyed by the local police at the termination of state proceedings. But his attorney was able to cross-examine the Government witnesses at trial. It was not essential to conviction that the Government introduce the physical evidence where it had been destroyed with no involvement of federal officials in its destruction.

Pasha argues that the Government failed to sustain its burden of proving beyond a reasonable doubt that the substance sold was a prohibited controlled substance because a break in the chain of custody cast doubt whether the substance found to be cocaine by the Government's chemist was actually obtained from the defendant. Therefore, he apparently

argues that the testimony of the chemist was improperly admitted.

The defense, after dilligent [sic] research, has been unable to find a single case, federal or otherwise, which authorized the submission of evidence to a finder of fact, such as was done here, where there is a break in the chain of custody which renders any later examination or testing intrinsically suspect.

Pasha's Memorandum of Law, at 2.

"It is clear that connection of physical evidence with a defendant may be shown by circumstantial evidence." United States v. Soto, 591 F.2d 1091, 1099 (5th Cir.), cert. denied, 442 U.S. 930, cert denied sub nom., Roman Pardon-Gonzales v. United States, 444 U.S. 845 (1979). "Evidence regarding a chain of custody does not affect admissiblity, only the weight of the

evidence." United States v. Morgan, 559 F.2d 397, 399 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978); United States v. Sarmiento-Perez, 724 F.2d 898 (11th Cir. 1984); United States v. Kubiak, 704 F.2d 1545, 1552 (11th Cir. 1983), cert. denied, _ U.S. _, 78 L.Ed.2d 149 (1983).

All the testimony allowed in evidence to show the substance seized was cocaine was admissible. The weight to be given this testimony was for the jury. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1941).

In United States v. Ortiz, 603 F.2d 76 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980), the physical evidence had been destroyed by local police but the court refused to suppress a chemist's

testimony establishing a substance as heroin.

We note first that federal officials were not involved at all in the (apparently inadvertent) destruction of the heroin. It was done by the local police while the substance was in their custody. There is therefore no hint of bad faith, collusion or culpability on the part of federal officials. The second factor to be weighed is the extent to which Ortiz was prejudiced by the destruction. It is true, as he argues, that he was deprived of the opportunity to test the chemical make-up of the substance himself. He was able, however, to question the chemist who performed the tests on the correctness and reliability of the procedures that were followed, and to challenge the veracity of the results. Id. at 80. Accord, United States v.

Green, 680 F2d. 520 (7th Cir.), cert. denied, _ U.S. _, 103 S.Ct. 493, 74 L.Ed. 2d 635 (1982); United States v. Parker, 491 F.2d 517, 522 n.5 (8th Cir. 1973), cert. denied, 416 U.S. 898 (1974); United States v. Graham, 464 F.2d 1073, 1076 (5th Cir.), cert. denied sub nom., John Lonnie Jerkins v. United States, 409 U.S. 987 (1972).

Here also, the evidence was destroyed while in the custody of local police (the District Attorney's Office had withdrawn prosecution). No federal officials were involved and there is nothing to indicate that anything favorable to the defendants was suppressed.

In Commonwealth v. McGlory, 313 A.2d 326 (Pa. Super. 1973), the Court affirmed defendant's conviction and held oral testimony admissible to establish physical evidence seized from defendant was a narcotic drug. Judge Hoffman

stated, at p. 329: There are no cases in this Commonwealth that require the production of tangible physical evidence, and "there exists no such rule as expounded by the defendant which would automatically necessitate his acquittal upon the Commonwealth's failure to produce physical evidence shown to be unavailable." Commonwealth v. Cromartie, 222 Pa. Super. 278, 280, 294 A.2d 762, 763 (1972); see also, Commonwealth v. Gazal, 185 Pa. Super. 91 137 A.2d 814 (1958). Defendant relies on Judge Hoffman's further statement that:

The fact that the inability of the Commonwealth to produce physical evidence is some cases would not serve as a basis for a reversal of a conviction does not mean that the Commonwealth does not have a burden in establishing the unavailabity of the evidence and that the testimony is based upon an unbroken chain of events

supporting the validity and connection to the evidence thereof.

Id. But here as in McGlory, the chain of custody was unbroken from the seizure of the materials to the analysis of the material at the laboratory where it was identified as a narcotic drug.

Officer D'Amico testified that he weighed the substance at the scene of the arrest, confiscated it, maintained it in his possession and brought it to the Philadelphia Police Administration Building. He testified that he turned the substance over to Officer McQuillan, that Officer McQuillan delivered the substance to the laboratory and dropped it in the sealed evidence bin. Mr. Brister, Philadelphia Police Chemist, testified that he retrieved the substance from the bin and tested it positively for cocaine. Although Officer McQuillan did not

personally testify that he carried the substance from Officer D'Amico to the laboratory, the testimony given was sufficient for the jury reasonably to find beyond a reasonable doubt that the substance Officer D'Amico seized was the substance tested in the laboratory and shown to be cocaine. Defendant had the opporutnity to cross-examine the Government's witnesses on the chain of custody and on the testing procedures. The jury's determination that the substance was cocaine was supported by substantial evidence and will not be disturbed.

ORDER

AND NOW, this 26th day of April, 1984, upon consideration of the motion of defendant Thomas Pasha for a new trial or dismissal of the indictment, it is ORDERED that said motion is DENIED for the reasons set forth in the foregoing Memorandum.

MEMORANDUM OPINION OF THE COURT

Appellants Thomas Pasha and Peter Straguzzi were found guilty of conspiracy to distribute a Schedule II controlled substance (cocaine), distribution of cocaine, and the use of a telephone to facilitate its distribution. On appeal they contend that the district court erred in admitting a chemical analysis of alleged cocaine without a sufficient showing that the substance was the same as allegedly seized in this case.

The government evidence included the testimony of undercover police officer John D'Amico who received the package in question, officer McQuillan, Dr. Thomas

Banford, Director of the Philadelphia police chemist. The government was not able to produce the actual substance, or a sample, because it was destroyed while it was in the custody of the Philadelphia police on authorization of a state court judge. Appellants raise no challenge relating to that destruction.

D'Amico testified that when he received the package, he weighed it at approximately 285 grams, smelled the aroma and believed it to be cocaine. App. at 4a. After the arrest, he hand carried the package to the Narcotics Unit, where he weighed it again and placed it in a substance bag with tape. He testified that he gave the package to Officer McQuillan who submitted it to the laboratory.

The procedure for handling such substances was explained by Dr. Banford

who testified that evidence when received is stamped for time and date, and the officer submitting the evidence is then instructed to place the evidence in a particular bin. Chemist Brister testified he removed a package from a sealed bin, that the total weight of the package was 285 grams, and that his analysis determined the substance was cocaine.

Appellants argue that the chain of custody was lacking because Officer McQuillan, who testified to his participation with D'Amico and others in the undercover operation. McQuillan was not asked and hence did not testify that he carried the cocaine from the Narcotis Unit to the laboratory. Indeed, the government makes no effort to explain why it failed to elicit from McQuillan that link in the chain, and we find that omission inexplicable.

Nonetheless, even the authorities proffered by appellants concede that automatic exclusion of testimony or evidence is not required when there is a small gap in the chain of custody. The district court found that the testimony given was sufficient for the jury reasonably to find beyond a reasonable doubt that the substance Officer D'Amico seized was the substance tested in the laboratory and shown to be cocaine. App. at 13a. We agree that on this record there was sufficient circumstantial evidence which would permit the jury to so find. D'Amico, McQuillan and Brister, the three people who handled the cocaine, did testify at trial and Dr. Banford testified about procedure for submitting evidence to the laboratory. They were all available for cross-examination by the defendants. Under the circumstances, the district

court did not err in permitting the testimony of the chemist.

We will affirm the judgment of the district court.